

No. 11119

United States
Circuit Court of Appeals
For the Ninth Circuit.

HOUGHTON GIFFORD,

Appellant,

vs.

THE TRAVELERS PROTECTIVE ASSOCIA-
TION OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

FILED

OCT 3 - 1945

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS:

Messrs. DUNNE & DUNNE, J. D. LEDERMAN,

333 Montgomery Street,
San Francisco, California.

Attorney for Plaintiff and Appellant.

Messrs. GAVIN McNAB, NAT SCHMULOWITZ,
BRONTE M. AIKINS, OLIVER B. WYMAN
and PETER S. SOMMER,

625 Market Street,
San Francisco, California.

Attorneys for Defendant and Appellee.

In the Superior Court of the State of California, in
and for the City and County of San Francisco

No. 331970

HOUGHTON GIFFORD,

Plaintiff,

vs.

THE TRAVELERS PROTECTIVE ASSOCIA-
TION OF AMERICA,

Defendant.

COMPLAINT

Plaintiff complains of above named defendant,
and for cause of action alleges and avers as follows:

I.

At all times herein mentioned defendant was and is a fraternal benefit society incorporated and licensed under the laws of the State of Missouri, and at all times herein mentioned was engaged in transacting business in the State of California.

II.

For a period of about fifteen (15) years prior to the [2*] 3rd day of September, 1943, George Gifford was a Class "A" member of defendant, having during all of said period fully complied with all the terms and conditions of such a membership, and having fully paid all of the dues and assessments imposed upon him as a Class "A" member of defendant.

*Page numbering appearing at foot of page of original certified Transcript of Record.

III.

On or about the 9th day of May, 1932, there was issued and delivered by defendant to said George Gifford a certificate of membership wherein and whereunder said George Gifford was entitled to the benefits accruing to a Class "A" member of defendant, and whereby said defendant agreed to and did insure said George Gifford against any accident occurring to him from which a claim for benefits arose; that in and under said certificate of membership and insurance defendant agreed to insure and to pay the benefits accruing to said George Gifford in the case of the death of said George Gifford to this plaintiff, the son of said George Gifford.

IV.

In and under and by virtue of said certificate of membership referred to and described in the preceding paragraph, defendant agreed to pay to this plaintiff as the beneficiary named in said certificate of membership the sum of Five Thousand Dollars (\$5,000.00) if the said member, George Gifford, were killed by accidental means, and if said George Gifford were at the time of his death a member in good standing and were killed by accidental means which independently of all other cause, through external, violent and accidental means, caused bodily injuries which solely and exclusively caused the death of said George Gifford.

V.

Said George Gifford was at all times herein mentioned, up to the time of his death on September 3, 1943, a Class "A" member in good standing of said defendant, and had fully complied with all the rules, regulations, by-laws and constitution and other requirements of defendant.

VI.

On or about the 3rd day of September, 1943, said George Gifford was killed by accidental means, which independently of all other causes, through external, violent and accidental means, caused bodily injuries to said George Gifford in the City and County of San Francisco, State of California, which said bodily injuries were the sole and exclusive cause of the death of said George Gifford on said 3rd day of September, 1943.

VII.

Said external, violent and accidental means which caused the bodily injuries that solely and exclusively caused the death of said George Gifford were as follows: to-wit: On September 3, 1943, said George Gifford was attempting to extricate an automobile which was the property of said George Gifford, and which had become jammed against the front door of the basement garage in the premises then occupied by said George Gifford at 2949 Anza Street in the City and County of San Francisco; in such efforts to extricate and free said automobile said George Gifford secured a piece of lumber of the

dimensions of about 2x4 inches, and of a length of 4 feet; with said piece of lumber in his hand said George Gifford climbed over the right fender of said automobile and stepped upon the right running board of said automobile; [4] upon stepping on said running board the right front door of said automobile suddenly and unexpectedly, and without the knowledge or observation of said George Gifford, flew open and struck said George Gifford a sharp, severe and violent blow on his skull in the vicinity of his left ear; and immediately upon receiving said blow from said door said George Gifford was knocked down and fell to the floor of the garage, became unconscious, and died within one hour as a direct result of said blow.

VIII.

Plaintiff has fully complied with all of the terms and conditions of said certificate of membership described in Paragraph III hereof, and duly and in the time provided for in said certificate notified the defendant of the death of said George Gifford as above described, and demanded payment of the \$5,000.00 insurance provided for in said certificate of membership heretofore described.

IX.

Defendant has refused payment of said sum, or any part thereof, and the same, and all thereof, remains due, owing and unpaid.

Wherefore, plaintiff demands judgment against defendant for the sum of Five Thousand Dollars

(\$5,000.00) with interest at the legal rate from the 3rd day of September, 1943, together with his costs of suit incurred herein, and for such other, further and different relief as, the premises considered, is proper.

DUNNE & DUNNE

J. D. LEDERMAN

Attorneys for Plaintiff. [5]

State of California

City and County of San Francisco—ss.

Houghton Gifford, being first duly sworn, deposes and says:

He is the plaintiff named in the foregoing Complaint; he has read the foregoing Complaint and knows the contents thereof; the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

HOUGHTON GIFFORD

Subscribed and sworn to before me this 1st day of September, 1944.

[Seal]

ROBERT H. RUSCH

Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed Sept. 1, 1944. [6]

(Here follows Notice of Removal from the Superior Court of the State of California, in and for the City and County of San Francisco to the District Court of the United States in and for the Northern District of California, Southern Division, Removal Petition and Removal Bond) [7]

[Title of Superior Court and Cause.]

ORDER REMOVING CAUSE TO FEDERAL COURT

Upon reading and filing the petition of The Travelers Protective Association of America, the defendant in the above entitled action, and upon filing the Bond, and good and sufficient sureties having been offered by the said defendant in the premises, and the same being by me, the Judge of the Superior Court, duly accepted, and it further appearing and being proved that written notice of said Petition and Bond for Removal has been duly given the plaintiff in said action prior to filing the same, as required by law,

It Is Hereby Ordered that no further proceedings be had in this cause and the removal of the same to the District Court of the United States in and for the Northern District of California, Southern Division thereof, be and the same is hereby [8] allowed and ordered in accordance with the afore-said Petition and the Statute of the United States in such case made and provided, and the Clerk of

this Court is hereby directed and ordered to furnish and deliver to the said defendant, upon its demand and the payment by it of the said Clerk's legal fees, a certified copy of the record and proceedings in this cause.

Dated this 28 day of September, 1944.

THOS. M. FOLEY

Judge of the Superior Court.

[Endorsed]: Filed Sept. 28, 1944. [9]

[Title of Superior Court and Cause.]

CERTIFICATION OF RECORD

State of California,

City and County of San Francisco—ss.

I, H. A. van der Zee, County Clerk of San Francisco and ex-officio Clerk of the Superior Court of the State of California, in and for the City and County of San Francisco, do hereby certify that the annexed and foregoing is a true, full and correct copy of the original:

Complaint.

Notice of Removal.

Removal Petition.

Removal Bond.

Order Removing Cause to Federal Court.

in the above entitled action, and that the foregoing constitutes [10] a certified copy of the record in the above entitled action and of the whole thereof on file in my office.

Dated: October 13, 1944

[Seal] H. A. VAN DER ZEE
 Clerk

 H. BRUNNER
 Deputy Clerk

[Endorsed]: Filed Oct. 27, 1944. [11]

[Title of Court and Cause.]

NOTICE OF FILING TRANSCRIPT OF
RECORD

To the above named Plaintiff, and to Messrs. Dunne
& Dunne, and J. D. Lederman, his Attorneys:

You, and each of you, will please take notice
that on the 28th day of September, 1944, the above
entitled cause was duly transferred from the Su-
perior Court of the State of California, In and
For the City and County of San Francisco, to the
District Court of the United States, In and For
the Northern District of California, Southern Divi-
sion, and that a certified copy of the Record in
said cause was filed in said District Court of the
United States on the 27th day of October, 1944.

GAVIN McNAB, SCHMULO-
WITZ, AIKINS, WYMAN &
SOMMER

By NAT SCHMULOWITZ

By PETER S. SOMMER

Attorneys for Defendant

Receipt of a copy of the foregoing Notice is acknowledged this 27th day of October, 1944.

DUNNE & DUNNE

J. D. LEDERMAN

Attorney for Plaintiff

[Endorsed]: Filed Oct. 31, 1944. [12]

In the District Court of the United States, in and
for the Northern District of California, South-
ern Division

No. 23911-G

HOUGHTON GIFFORD,

Plaintiff,

vs.

THE TRAVELERS PROTECTIVE ASSOCIA-
TION OF AMERICA,

Defendant.

NOTICE OF MOTION FOR A SUMMARY
JUDGMENT DISMISSING PLAINTIFF'S
COMPLAINT WITH PREJUDICE

To: Houghton Gifford, plaintiff, and to Messrs.
Dunne & Dunne and J. D. Lederman, his attor-
neys—

You, and Each of You, Are Hereby Notified that
the defendant in the above-entitled action will on
the 20th day of November, 1944, at the hour of
10:00 o'clock A. M. of [13] said day or as soon

thereafter as counsel can be heard, before the Honorable Louis E. Goodman, judge of the above-entitled court, at its courtroom in the United States Courts and Post Office Building, 7th and Mission Streets, San Francisco, California, move the above-entitled court for an order or orders designated a Summary Judgment in favor of the defendant dismissing plaintiff's complaint on file herein with prejudice. The said motion will be made upon the grounds and for the reasons that the defendant is entitled to a summary judgment in favor of the defendant, dismissing plaintiff's complaint on file herein with prejudice. The said motion will be made upon the grounds and for the reasons, among others, that the alleged cause of action has become barred and that the claim has lapsed by reason of the failure on the part of the plaintiff to commence any action against the above-named defendant in respect of his alleged claim arising under the Certificate of Membership or the Constitution and By-Laws of the defendant within six (6) months after the refusal of the defendant to pay plaintiff's claim, and by reason thereof the defendant is entitled to a summary judgment as a matter of law and that if the above-entitled case were tried by a jury the court would be constrained to direct a verdict for the defendant without submitting the case to the jury; and that it affirmatively appears from the plaintiff's complaint and from the affidavit of defendant filed concurrently herewith and from all of the records, pleadings and files in the above-entitled action that the plaintiff cannot state

or prove any claim against this defendant upon which any relief can be granted and that the lapse of more than six months after the refusal of this defendant to pay plaintiff's claim is conclusive evidence against the validity of said claim. The within motion will be presented in pursuance of the authority granted under Rule 56 (b) of the Rules of Civil [14] Procedure and will be based upon plaintiff's complaint, the within notice of motion, the affidavit of the defendant filed and served concurrently herewith, and all of the records, pleadings and files in the above-entitled action.

Dated: October 31st, 1944.

GAVIN McNAB, SCHMULOWITZ,
AIKINS, WYMAN &
SOMMER,

By NAT SCHMULOWITZ

By PETER S. SOMMER

Attorneys for Defendant.

(Acknowledgment of Receipt of Copy.)

[Endorsed]: Filed Oct. 31, 1944. [15]

[Title of District Court and Cause.]

MOTION TO DISMISS COMPLAINT AND TO
MAKE THE COMPLAINT MORE DEFINITE
AND FOR A BILL OF PARTICULARS

Comes now the defendant in the above-entitled action and moves the court as follows:

(A) To dismiss the complaint in the above-entitled [16] action because the complaint fails to state a claim against this defendant upon which any relief can be granted.

(B) To dismiss the complaint in the above-entitled action because it appears from said complaint and the supporting affidavit of the defendant filed concurrently herewith that plaintiff's alleged cause of action is barred by virtue of the terms, covenants and provisions of the contract entered into by and between George Gifford and this defendant.

(C) In the event that the complaint is not dismissed for the foregoing reasons, or either of them, then the plaintiff be required to file and serve a more definite statement of matters in respect of his complaint, or for a bill of particulars of the following matters referred to in said complaint, all of which are not available with sufficient definiteness or particularly to enable this defendant properly to prepare its responsive pleading or to prepare for trial.

All references to the numbered paragraphs hereinafter set forth relate to the similarly numbered paragraphs of the complaint. All references to George Gifford will be made to him by reference to him as "insured."

1. Relating to Paragraph III: a statement disclosing the claims of the plaintiff as to the exact terms, covenants and conditions of the Certificate of Membership issued and delivered by the defendant to the said insured on or about May 9, 1932,

and in the event that the said Certificate of Membership refers to the Constitution, By-Laws and Articles of Incorporation of The Travelers Protective Association of America, then disclose the full text of the Constitution, By-Laws and Articles of Incorporation, particularly the full text of Section 7 of Article XII of the Constitution and By-Laws.

2. As to Paragraph IV: a statement setting forth the [17] claims of the plaintiff as to whether the agreements of the defendant in, under and by virtue of the Certificate of Membership as set forth in said Paragraph IV comprise all of the agreements of the defendant, and, if not, set forth the full text representing all of the agreements of the defendant.

3. As to Paragraph VI:

(a) A statement disclosing what bodily injuries the insured received on September 3, 1943;

(b) A statement disclosing whether there were any other causes that contributed to the death of the insured besides the alleged but unidentified bodily injuries referred to therein.

4. As to Paragraph VII:

(a) A statement disclosing whether the conduct described in this paragraph on the part of the insured was voluntary;

(b) A statement disclosing whether the conduct of the insured as described in this paragraph was necessary;

(c) A statement disclosing whether at the time of the conduct described in this paragraph the

insured had any bodily or mental infirmity or disease;

(d) A statement as to whether or not at or about the time of the alleged injuries the insured had any visible marks of injury upon his body;

(e) A statement disclosing what precise bodily injuries the insured received as the result of the alleged blow on his skull;

(f) A statement as to what the age of the insured was at the time he received the alleged bodily injuries;

(g) A statement as to whether there was any coroner's inquisition into the circumstances attending the death of said insured and, if so, what was the result of said inquisition.

5. As to Paragraph VIII: [18]

(a) A statement of how or in what manner the plaintiff complied with all of the terms and conditions of the Certificate of Membership and when alleged compliance was made and what provisions of the Certificate of Membership related thereto;

(b) A statement as to whether plaintiff's notification to the defendant of the death of said insured and plaintiff's demand of payment were oral or in writing and, if in writing, when and in what form said notice and demand were made.

6. As to Paragraph IX: A statement from the plaintiff as to when the defendant refused the payment of the sum of \$5,000.00, and also as to the form in which said refusal was made, and, if in writing, then set forth the writing in haec verba,

including the time of the receipt of said refusal by the plaintiff.

(D) Said defendant will further move for an order directing that as to such paragraphs of this motion or any items thereof as to which the plaintiff shall state in his bill of particulars that he has no knowledge or information, or incomplete knowledge or information, then plaintiff shall be required to furnish this defendant in his bill of particulars whatever knowledge or information he may have or furnish further particulars within ten (10) days after he has obtained further knowledge or information, and in any event not later than thirty (30) days before trial.

(E) And said defendant will further move for an order extending the time of the defendant to answer the complaint until thirty (30) days after service upon the attorneys for this defendant of a copy of the more definite statement and of the bill of particulars directed to be furnished by the order to be entered upon this motion. Or, in the event that this motion in its entirety or the part thereof seeking a more definite statement and a bill of particulars be denied in all respects, then until thirty [19] days after service upon the attorneys for this defendant of a copy of the order denying such motion with notice of entry thereof.

(F) Defendant will further move for an order

granting to it such other and further relief as may be deemed just and proper in the premises.

GAVIN McNAB, SCHMULOWITZ
WITZ AIKINS, WYMAN &
SOMMER

By NAT SCHMULOWITZ

By PETER S. SOMMER

(Acknowledgment of Receipt of Copy.)

[Endorsed]: Filed Oct. 31, 1944. [20]

[Title of District Court and Cause.]

NOTICE OF MOTION TO DISMISS COMPLAINT TO MAKE COMPLAINT MORE DEFINITE AND FOR A BILL OF PARTICULARS

To: Houghton Gifford, Esquire, Plaintiff, and to Messrs. Dunne & Dunne and J. D. Lederman, his attorneys—

You and Each of You Are Hereby Notified that the defendant in the above-entitled action will on the 20th day of [21] November, 1944, at the hour of 10:00 o'clock a. m. of said day, or as soon thereafter as counsel can be heard, before the Honorable Louis E. Goodman, judge of the above-entitled court, at its courtroom in the United States Courts and Post Office Building, Seventh and Missions Streets in San Francisco, California, move the above-entitled court for an order or orders for the dismissal of the complaint and for an order

directing plaintiff to furnish a more definite statement and a bill of particulars with respect to each and every of the matters set forth in the motions attached hereto and made a part hereof. The said motions will be made upon the grounds and for the reasons that the moving defendant is entitled to present the aforesaid motions under the Rules of Civil Procedure, to wit, Rule 12 Subdivisions (a), (b) and (e) and will be based upon the complaint herein, the within motion and notice thereof and all of the records, pleadings and files in the above-entitled action, together with the affidavit of T. G. Hagaman, a copy of which is annexed.

Dated: October 31, 1944.

GAVIN McNAB, SCHMULOWITZ, AIKINS, WYMAN & SOMMER

By NAT SCHMULOWITZ

By PETER S. SOMMER

Attorneys for Defendant.

(Acknowledgment of Receipt of Copy.) [22]

[Title of District Court and Cause.]

AFFIDAVIT OF T. G. HAGAMAN, ASSISTANT SECRETARY OF TRAVELERS PROTECTIVE ASSOCIATION OF AMERICA

State of Missouri

City of St. Louis—ss.

T. G. Hagaman, being first duly sworn, deposes and says: [23]

That he is an officer, to wit, the Assistant Secretary of The Travelers Protective Association of America, the defendant herein, and that he makes this affidavit on its behalf. Affiant avers that the defendant in the above-entitled action duly issued its Class A Certificate of Membership to George Gifford on or about May 9, 1932, and that attached hereto marked Exhibit "A" and by such reference made a part hereof is a full, true and correct copy of said certificate.

Affiant avers that attached hereto, marked Exhibit "B" and by such reference made a part hereof is a full, true and correct copy of the Articles of Incorporation, Constitution and By-laws of The Travelers Protective Association of America in full force and effect on or about September 3, 1943, which said date is alleged in Paragraphs VI and VII of plaintiff's complaint to be the date on or about which the said George Gifford allegedly received bodily injuries allegedly causing his death.

Affiant avers that heretofore and prior to December 21, 1943, plaintiff herein made a claim against the defendant and that said plaintiff asserted said claim as the beneficiary of the aforesaid Certificate of Membership marked Exhibit "A" and that thereafter this defendant refused to pay the said claim and notified the plaintiff in writing of the refusal of the defendant to pay the said claim of plaintiff, and that the plaintiff received the said notice of refusal of the defendant to pay the same

on or about December 27, 1943, and that attached hereto, marked Exhibit "C" and by such reference made a part hereof, is a full, true and correct copy of the said notice of refusal.

That at all times since May 9, 1932 there has been and there now is in full force and effect as part of the Constitution and By-laws of The Travelers Protective Association of America [24] Article XII, Section 7 thereof, which reads as follows:

"Limitations for Suits

Sec. 7. No action against this Association for the recovery on any claim arising under the Certificate of Membership or the Constitution and By-Laws shall be sustained unless commenced within six months after the refusal of this Association to pay the same and a lapse of such period shall be conclusive evidence against the validity of such claim asserted if an action for its enforcement be subsequently commenced."

Affiant avers that no action was commenced by the plaintiff against the defendant, The Travelers Protective Association of America, in respect of the aforesaid claim other than the above-entitled action and that said action was commenced in the Superior Court of the State of California in and for the City and County of San Francisco on September 1, 1944, more than six months after the refusal of the defendant and the written notice

thereof to the plaintiff to pay said claim as herein set forth.

T. G. HAGAMAN

Asst. Sec'y.

Subscribed and sworn to before me this 10th day of October, 1944.

[Seal] K. C. McLAUGHLIN

Notary Public in and for the City of St. Louis,
State of Missouri.

My Commission Expires December 12, 1946. [25]

EXHIBIT "A"

Class "A" Certificate of Membership

The Travelers Protective Association of America, Incorporated and Licensed Under the Laws of the State of Missouri as a Fraternal Benefit Society.

Members All Over the U. S. A.

By This Certificate of Membership, Certifies that George Gifford is a Class "A" member of said The Travelers Protective Association of America, and is entitled to such benefits as may be provided for Class "A" members in and by the Constitution, By-Laws and Articles of Incorporation of said Association in force and effect at the time any accident occurs from which a claim for benefits arises.

Benefits in case of death payable to Houghton Gifford his son. This Certificate, the Constitution, By-Laws and Articles of Incorporation of said As-

sociation, and Application for Membership, signed by said member, and all amendments thereto shall constitute the agreement between said Association and said member, and shall govern the payment of benefits and any changes., additions or amendments to said Constitution, By-Laws or Articles of Incorporation, hereafter duly made shall bind said member and his beneficiary or beneficiaries, and shall govern and control the contract in all respects the same as though such changes, additions or amendments had been made prior to, and were in force at the time of said member's application for membership.

In Witnes Whereof, this Association has caused this Certificate to be signed by its President and Secretary under the seal of the Association at St. Louis, Mo., this 9th day of May A. D. 1932.

Any member meeting with an accident must notify the Secretary-Treasurer at St. Louis Mo., in writing within thirty days of such accident, giving full particulars of same and name of attending physician. In case of death the beneficiary shall give such notice. In case of failure to notify except because of unconsciousness or physical inability the member or his beneficiaries shall forfeit all rights to insurance benefits.

No. 36827

T. S. LOGAN

Secretary.

WM. E. WELLMANN

President.

The following benefits are provided for Class "A" members or their beneficiaries, each subject to the conditions, exceptions and limitations of the constitution of this Association and amendments thereto, whenever a member in good standing shall, independently of all other causes, through external, violent and accidental means, receive bodily injuries which shall solely and exclusively cause death or disability:

1. \$10,000 if killed by accidental means as the result of a wreck, collision or derailment while riding as a passenger, inside a passenger car, on a passenger train propelled by steam, or moved by electricity, at the steam railroad's terminal only, or over an electrified section of such steam railroad only.

2. \$5,000 if killed by accidental means.

3. \$5,000 for the loss of both legs or both arms by severance by accidental means.

4. \$2,500 for the loss of one hand or one foot by severance above wrist or ankle by accidental means.

5. \$1,300 in case of loss of four fingers of either hand by severance by accidental means.

6. \$5,000 in case of loss of both eyes by accidental means.

7. \$1,250 in case of loss of one eye by accidental means.

8. \$25 per week for total disability, not exceeding 104 weeks, by accidental means.

9. \$12.50 per week for partial disability, not exceeding five weeks, by accidental means.

Art. XIV, Sec. 1. Any member in good standing, wishing to change his beneficiary, shall be entitled on the surrender of the certificate of membership then in force and upon the payment of a certificate fee of fifty cents to the Secretary-Treasurer (said fee to be credited to the Expense Fund) except in the event of death of the beneficiary or the marriage of the member, this charge shall be remitted, to have a new certificate of membership issued, payable to such qualified beneficiary or beneficiaries as he shall direct. The surrender of the certificate of membership shall be waived provided the member at whose instance it was issued shall furnish satisfactory proof that the same has been lost or destroyed.

No. 36827

Class "A" Certificate of Membership in The
Travelers Protective Association of America,
St. Louis, Mo.

Issued to George Gifford, Neb. Division.

Dated May 9 1932

In case of injury, fatal or disabling, written notice within thirty days from date of injury must be furnished the Secretary-Treasurer of The Travelers Protective Association of America, at 3755 Lindell Blvd., St. Louis, Mo.

EXHIBIT "C"

December 21, 1943

Mr. Houghton Gifford
139 Hugo Street
San Francisco (8), California.

In re: George Gifford, Deceased
No. 36827

Dear Sir:

Upon receipt of the notice of your father's death this Association, in accordance with the request made by your mother, investigated the facts in reference thereto.

This Association provides benefits for the beneficiaries of its members in those cases where death is due to external, violent and accidental means independently of all other causes. Liability is expressly excluded where death is caused wholly through any bodily or mental infirmity or disease. The conclusion reached by the pathologist who performed the autopsy is that your father's death was caused by "Coronary sclerosis with occlusion and myocardial failure. Angioma of the brain. Pyelonephritis." The official death certificate likewise discloses that death was "Death due to natural causes." Under the circumstances we regret to advise you that there is no liability on the part of

the Association and it regrets that it cannot be of service to you.

Sincerely yours

THE TRAVELERS PROTECTIVE
ASSOCIATION OF AMERICA

(sgd.) By THEO. C. ABELE

Secretary

TCA:MPP:EP

(letter registered)

[Endorsed]: Filed Oct. 31, 1944 [28]

[Title of District Court and Cause.]

MEMORANDUM DECISION ON MOTIONS TO
DISMISS AND FOR SUMMARY JUDG-
MENT.

The pleadings and record now before the court on defendant's motions to dismiss and for summary judgment demonstrate that plaintiff's cause of action is barred because of lapse of time as stipulated in the insurance contract.

However I am of the opinion that plaintiff should not at this stage of the litigation be deprived of the opportunity to plead by way of replication any pertinent facts in avoidance of the time limitation.

Accordingly the motion to dismiss is granted with leave to plaintiff to appropriately amend his complaint. (Rule 15 P.R.C.P.) [29]

Decision on the motion for summary judgment is reserved and the court will determine the same

after the amended complaint and such affidavits as defendant may desire to file are before the court.

Dated: January 29, 1945.

LOUIS E. GOODMAN

United States District Judge

[Endorsed]: Filed Jan. 29, 1945. [30]

[Title of District Court and Cause.]

To Houghton Gifford, Plaintiff above named, and
To Messrs. Dunne & Dunne and J. D. Leder-
man, his Attorneys::

You and each of you will please take notice that the Honorable Louis E. Goodman, Judge of the United States District Court, did on the 29th day of January, 1945, grant defendant's motion to dismiss plaintiff's complaint with leave to plaintiff to amend his complaint if he be so advised, reserving the Court's decision on defendant's motion for summary judgment until after the filing of the amended complaint by plaintiff if he be so advised, within ten days, and such affidavits as defendant may desire to file within ten days thereafter if said defendant be so advised. [31]

Dated: February 1, 1945

GAVIN McNAB, SCHMULOWITZ, AIKINS, WYMAN & SOMMER

By NAT SCHMULOWITZ

By PETER S. SOMMER,

Attorneys for Defendant

[Endorsed]: Filed Feb. 2, 1945. [32]

In the District Court of the United States in and
for the Northern District of California, Southern
Division

No. 23911-G

HOUGHTON GIFFORD,

Plaintiff,

vs.

THE TRAVELERS PROTECTIVE ASSOCIATION OF AMERICA,

Defendant.

JUDGMENT ON MOTION FOR SUMMARY
JUDGMENT

The motion of the defendant for a summary judgment in its favor and dismissing plaintiff's complaint with prejudice coming on regularly for hearing, and due notice thereof having been given; and

It Appearing that contemporaneously with the said motion for a summary judgment the said defendant moved to dismiss plaintiff's complaint, and

that the above entitled Court did, on January 29, 1945, grant defendant's motion to dismiss plaintiff's complaint, with leave to plaintiff to amend his [33] complaint, if he be so advised; and

It Further Appearing that the above entitled Court did reserve its decision on the defendant's aforesaid motion for a summary judgment until after the filing of the amended complaint by plaintiff, if he be so advised within ten days; and

It Further Appearing that the plaintiff in the above entitled action did receive notice of the rulings of the above entitled court as above set forth on February 1, 1945, and that said plaintiff has not filed any amended complaint within ten days from and after February 1, 1945; and

It Further Appearing that the defendant is entitled to have its motion for a summary judgment granted upon the ground that it is entitled to a judgment dismissing plaintiff's complaint, as a matter of law, for the reason that plaintiff's cause of action is barred because of the lapse of time as stipulated in the contract of insurance referred to in plaintiff's complaint;

It Is Accordingly Adjudged that the complaint in this action be and it is hereby dismissed with prejudice upon the ground that there is no genuine issue as to any material fact, and upon the further ground that the alleged cause of action set forth in plaintiff's complaint has become barred, and that the claim has lapsed by reason of the failure on the part of plaintiff to commence any action against the above named defendant in respect of his alleged

claim arising under the certificate of membership, and the constitution and bylaws of the defendant within six months after the refusal of the defendant to pay plaintiff's claim; and

It Is Further Adjudged that the defendant, The Travelers Protective Association of America, a corporation, recover [34] of and from the plaintiff, Houghton Gifford, the sum of \$....., representing its costs as taxed, and have execution issue therefor.

Dated February 14, 1945.

LOUIS E. GOODMAN

Judge of the District Court

[Endorsed]: Filed Feb. 14, 1945. [35]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Houghton Gifford, the plaintiff above named, hereby gives notice that he does hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment dated, filed and entered in the above entitled action on February 14, 1945 by the above entitled Court and from each and every part thereof.

Dated May 14, 1945.

DUNNE & DUNNE

J. D. LEDERMAN

Attorneys for Houghton Gifford, the Plaintiff and Appellant

[Endorsed]: Filed May 14, 1945. [36]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH
APPELLANT INTENDS TO RELY

(1) That said Judgment entered by the above entitled Court on the 14th day of February 1945 is erroneous, wherein it declared that the defendant was entitled to have its Motion for Summary Judgment granted and that it was entitled to a Judgment Dismissing Plaintiff's Complaint as a matter of law, for the reason that Plaintiff's Cause of Action is barred because of the lapse of time as stipulated in the contract of insurance referred to in Plaintiff's Complaint.

(2) That said Judgment of February 14, 1945, is erroneous wherein it dismisses with prejudice the Plaintiff's Complaint upon the ground that there is no genuine issue as to any material fact and upon the further ground that the alleged cause of action set forth in Plaintiff's Complaint had become barred, and that the claim had lapsed by reason of the failure on the part of Plaintiff to commence any action against the above named Defendant in respect of his alleged claim arising under the certificate of membership and the Constitution and By-Laws of the Defendant within six months after the refusal of the Defendant to pay Plaintiff's claim. [37]

(3) That said judgment of February 14, 1945 is erroneous in that it seeks to and does attempt to bind the Plaintiff by its Articles of Constitution and By-Laws, even though the Plaintiff was not a member of the Defendant's Association.

(4) Said judgment of February 14, 1945 is erroneous in that it gives the Constitution and By-Laws of Defendant the effect and dignity and legal force of a statute of limitation, which is contrary to the law and the decisions of the Courts.

(5) That said judgment of February 14, 1945 is erroneous and contrary to the law in that it disregards the allegations of the Complaint, which on a Motion to Dismiss, and on a Motion for Summary Judgment must be deemed to be true and must be construed most favorably in favor of the Plaintiff.

(6) That said Judgment of February 14, 1945 is erroneous in that it dismisses the Complaint with Prejudice, and that said Judgment is also erroneous in granting a Summary Judgment in favor of the Defendant in the absence of any Answer having been made and filed by the Defendant herein.

Dated: at San Francisco, California, this 23rd day of May, 1945.

Respectfully submitted

DUNNE & DUNNE

J. D. LEDERMAN

By J. D. LEDERMAN

Attorneys for Appellant

Receipt of a copy of the within Statement of Points on which Appellant intends to reply, is hereby acknowledged this 23rd day of May, 1945.

SCHMULOWITZ, McNAB, WY-
MAN, AIKINS & SOMMERS

Attorneys for Appellee

[Endorsed]: Filed May 24, 1945. [38]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

Comes now Houghton Gifford, Appellant herein, and in accordance with Rule 75 (a) of the Federal Rules of Civil Procedure designates the following as the portions of the record, proceedings and evidence to be contained in the Record on Appeal, notice of which said Appeal was heretofore filed herein on the 14th day of May 1945, viz:

(1) Appellant's verified Complaint, dated September 1, 1944, which said Complaint was filed originally in the Superior Court of the State of California, in and for the City and County of San Francisco, and numbered 331,970.

(2) Order removing cause to Federal Court, dated September 28, 1944.

(3) Notice of filing of transcript of the record setting forth that the above entitled cause was duly transferred from the Superior Court of the State of California, in and for the City and County of San Francisco, to the above entitled Court, which said Notice is dated October 27, 1944. [39]

(4) Notice of Motion to Dismiss Complaint, to make Complaint more definite and for a Bill of Particulars, and the affidavit of T. G. Hagaman, verified October 10, 1944; the said Notice of Motion being dated October 31, 1944; save that there need not be copied in said affidavit the said Exhibit "B" attached to said affidavit, being the Articles of Incorporation, Constitution and By-Laws of The

Travelers Protective Association of America, it being stipulated, however, that both parties may refer to any portion of said Exhibit and incorporate such portions in their Briefs.

(5) Notice of Motion for a Summary Judgment dismissing plaintiff's Complaint with Prejudice, dated October 31, 1944.

(6) Motion to Dismiss Complaint and to make Complaint more definite and for a Bill of Particulars, dated and filed herein October 31, 1944.

(7) Memorandum Decision on Motions to Dismiss and for Summary Judgment, dated January 29, 1945, and filed herein on that date.

(8) Judgment on Motion for Summary Judgment, dated and filed herein on February 14, 1945.

(9) Notice of Appeal of Plaintiff filed May 14, 1945.

(10) A copy of this designation.

(11) A copy of Plaintiff's Statement of Points on which appellant intends to rely, filed herein with this designation.

Dated at San Francisco, California, this 23rd day of May, 1945.

Respectfully submitted,

DUNNE & DUNNE

J. D. LEDERMAN

Attorneys for Appellant

Receipt of a copy of the within Designation of

Contents of Record on Appeal is hereby acknowledged this 23rd day of May, 1945.

SCHMULOWITZ, McNAB, WY-
MAN, AIKINS & SOMMER
Attorneys for Appellee [40]

[Endorsed]: Filed May 24, 1945. [41]

[Title of District Court and Cause.]

RESPONDENT'S DESIGNATION OF ADDI-
TIONAL PORTIONS OF RECORD ON
APPEAL

Comes now The Travelers Protective Association of America, respondent herein, and in accordance with Rule 75 (a) of the Federal Rules of Civil Procedure designates the following as additional portions of the record, proceedings and evidence to be included in the Record on Appeal:

1. Memorandum decision on motions to dismiss and for summary judgment dated and filed herein on January 29, 1945.

2. Notice to plaintiff and Messrs. Dunne & Dunne and J. D. Lederman, his attorneys, from Gavin McNab, Schmulowitz, Aikins, Wyman & Sommer that the Honorable Judge Louis E. Goodman on January 29, 1945, granted defendant's motion to dismiss with leave to plaintiff to amend, reserving the Court's decision on defendant's motion for summary judgment until after [42] filing of amended complaint by plaintiff dated February 1, 1945 and filed herein on February 2, 1945.

3. Exhibits "A" and "C" attached to the affidavit of T. G. Hagaman, verified October 10, 1944.

4. That Exhibit "B" attached to the affidavit of T. G. Hagaman, verified October 10, 1944, be copied for annexation in the Record on Appeal, unless in lieu thereof counsel for appellant offer to stipulate that they will secure an order from the District Court of the United States in and for the Northern District of California Southern Division to transfer said original Exhibit "B", attached to said affidavit, to the United States Circuit Court of Appeals for the Ninth Circuit and that after transfer of said record to the United States Circuit Court of Appeals for the Ninth Circuit said appellant will stipulate that said United States Circuit Court of Appeals for the Ninth Circuit may consider said Exhibit "B" in its original form and further stipulate that counsel for respondent will furnish six (6) printed copies of said Exhibit "B" for said Court's use and consideration.

5. A copy of this designation dated at San Francisco, California, this 26th day of May, 1945.

Respectfully submitted,

GAVIN McNAB, SCHMULOWITZ,
AIKINS, WYMAN & SOMMER

By NAT SCHMULOWITZ

PETER S. SOMMER

Attorneys for Respondent

Receipt of a copy of the within Respondent's Designation of Additional Portions of Record on

Appeal is hereby acknowledged this 26 day of May, 1945.

DUNNE & DUNNE

J. D. LEDERMAN

Attorneys for Appellant

[Endorsed]: Filed May 28 1945. [43]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO
FILE RECORD ON APPEAL

Good Cause Appearing, It Is Hereby Ordered that plaintiff and appellant be, and he is hereby, granted to and including the 15th day of July, 1945, within which to file his record on appeal and to docket said action in the United States Circuit Court of Appeals for the Ninth Circuit; and

It Is Further Ordered that the Clerk of the District Court shall include a copy of this Order in the record on appeal in the above entitled matter.

Done in Open Court this 20th day of June, 1945.

LOUIS GOODMAN

United States District Judge.

[Endorsed]: Filed June 20, 1945. [44]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE
RECORD ON APPEAL.

Good cause appearing therefor, it is hereby Ordered that the Appellant herein may have to and including August 11, 1945 to file the Record on Appeal in the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated: July 14, 1945.

MICHAEL J. ROCHE

United States District Judge.

[Endorsed]: Filed July 14, 1945. [45]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 45 pages, numbered from 1 to 45, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of Houghton Gifford, Plaintiff, vs. The Travelers Protective Insurance Association of America, Defendant, No. 23911 G, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on

appeal is the sum of \$4.85 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 31st day of July A. D. 1945.

[Seal]

C. W. CALBREATH,

Clerk

By M. E. VAN BUREN

Deputy Clerk [46]

[Endorsed]: No. 11119. United States Circuit Court of Appeals for the Ninth Circuit. Houghton Gifford, Appellant, vs. The Travelers Protective Association of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California Southern Division.

Filed August 7, 1945.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11119

HOUGHTON GIFFORD,

Appellant,

v.

THE TRAVELERS PROTECTIVE ASSOCIA-
TION OF AMERICA,

Appellee.

CONCISE STATEMENT OF POINTS TO BE
RELIED UPON BY APPELLANT ON
APPEAL UNDER RULE 19, PAR. 6

Comes now Houghton Gifford, appellant herein, and as statement of points to be relied upon by him on his appeal herein, he does hereby adopt the statement of points filed by him on May 24, 1945, with the Clerk of the United States District Court for the Northern District of California, in accordance with Rule 75 (a) of the Federal Rules of Civil Procedure.

Dated: at San Francisco, California, this 7th day of August, 1945.

Respectfully submitted,

DUNNE & DUNNE

J. D. LEDERMAN

By J. D. LEDERMAN

Attorneys for Appellant

Receipt of copy of above Statement is hereby admitted this 7th day of August, 1945.

GAVIN McNAB, SCHMULOWITZ,
AIKINS, WYMAN & SOMMER,
NAT SCHMULOWITZ

By PETER S. SOMMER

Attorneys for Appellee

[Endorsed]: Filed Aug. 7, 1945. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF PARTS OF RECORD NECESSARY FOR THE CONSIDERATION OF THE APPEAL UNDER RULE 19, PAR. 6

Comes now Houghton Gifford, appellant herein, and hereby designates, as the parts of the record which he thinks necessary for the consideration of such appeal, the entire record as contained in the transcript of said record on appeal heretofore transmitted to the Clerk of the above entitled court by the Clerk of the United States District Court for the Northern District of California.

Dated at San Francisco, California, this August 7, 1945.

Respectfully submitted,

DUNNE & DUNNE

J. D. LEDERMAN

By J. D. LEDERMAN

Attorneys for appellant.

Receipt of copy of above Designation is hereby admitted this 7th day of August, 1945.

GAVIN McNAB, SCHMULOWITZ,
AIKINS, WYMAN & SOMMER
NAT SCHMULOWITZ

By PETER S. SOMMER

Attorneys for Appellee

[Endorsed]: Filed Aug. 7, 1945. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF ADDITIONAL PARTS OF
THE RECORD DEEMED NECESSARY
FOR THE CONSIDERATION OF THE
APPEAL UNDER RULE 19, PARA-
GRAPH 6.

Comes now The Travelers Protective Association of America, respondent herein, and in accordance with Rule 75 (a) of the Federal Rules of Civil Procedure and Rule 19, paragraph 6 thereof of the rules of the United States Circuit Court of Appeals for the Ninth Circuit, designates the following as additional parts of the record which it thinks necessary and material for the consideration of the appeal in the above entitled action:

1. Memorandum decision on motions to dismiss and for summary judgment dated and filed herein on January 29, 1945.

2. Notice of plaintiff and Messrs. Dunne & Dunne and J. D. Lederman, his attorneys, from

Gavin Mc Nab, Schmulowitz, Aikins, Wyman & Sommer that the Honorable Judge Louis E. Goodman on January 29, 1945, granted defendant's motion to dismiss with leave to plaintiff to amend, reserving the Court's decision on defendant's motion for summary judgment until after filing of amended complaint by plaintiff dated February 1, 1945, and filed herein on February 2, 1945.

3. Exhibits "A" and "C" attached to the affidavit of T. G. Hagaman, verified October 10, 1944.

4. That Exhibit "B" attached to the affidavit of T. G. Hagaman, verified October 10, 1944, be copied for annexation in the Record on Appeal, unless in lieu thereof counsel for appellant offer to stipulate that they will secure an order from the District Court of the United States in and for the Northern District of California Southern Division to transfer said original Exhibit "B", attached to said affidavit, to the United States Circuit Court of Appeals for the Ninth Circuit and that after transfer of said record to the United States Circuit Court of Appeals for the Ninth Circuit said appellant will stipulate late that said United States Circuit Court of Appeals for the Ninth Circuit may consider said Exhibit "B" in its original form and further stipulate that counsel for respondent will furnish six (6) printed copies of said Exhibit "B" for said Court's use and consideration.

5. A copy of this designation dated at San Francisco, California, this 7th day of August, 1945.

Respectfully submitted,

GAVIN McNAB, SCHMULOWITZ,
WITZ, AIKINS, WYMAN &
SOMMER

By NAT SCHMULOWITZ
PETER S. SOMMER

Attorneys for Appellee

Receipt of a copy of the within Appellee's Designation of Additional Parts of the Record on Appeal is hereby acknowledged this 7th day of August, 1945.

DUNNE & DUNNE

J. D. LEDERMAN

Attorneys for Appellant

[Endorsed]: Filed Aug. 7, 1945. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION

It Is Hereby Stipulated, Consented and Agreed, by and between the appellant and the appellee, that Exhibit "B" attached to the Affidavit of T. C. Hagaman, verified October 10, 1944, may be transmitted in its original form to the above entitled court by the Clerk of the United States District Court for the Northern District of California and that the above entitled court may consider said Ex-

hibit "B" in its original form on the appeal herein and that counsel for appellee are herewith furnishing six (6) printed copies of said Exhibit "B" for the use of the above entitled court and its consideration.

Dated at San Francisco, California, this 7th day of August, 1945.

DUNNE & DUNNE

J. D. LEDERMAN

By J. D. LEDERMAN

Attorneys for appellant

GAVIN McNAB, SCHMULOWITZ,
AIKINS WYMAN &
SOMMER

NAT SCHMULOWITZ

By PETER S. SOMMER

Attorneys for appellee.

So Ordered:

FRANCIS A. GARRECHT

Senior United States Circuit
Judge

[Endorsed]: Filed Aug. 8, 1945. Paul P.
O'Brien, Clerk.

